88-803

No. 88-_____

Supreme Court, U.S.
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NOV 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

GRANT ANTHONY,

Petitioner,

v.

OTIS R. BOWEN, Secretary,
United States Department
of Health and Human Services, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT and APPENDIX

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Attorney of Record for
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November 15, 1988

QUESTIONS PRESENTED

1. Does invocation of mandamus jurisdiction, 28 U.S.C., section 1361 (1982), to enforce rights guaranteed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e, et seq., preclude, ipso facto, Title VII prevailing party status to the complainant?

2. Did the Court of Appeals err in denying that the petitioner prevailed on the merits of his substantive claim under Title VII of the Civil Rights Act of 1964, where:

(i) the agency had expressly adopted the EEOC's finding of illegal discrimination;

(ii) the agency had instituted remedial relief; and

(iii) the District Court subsequently precluded the reopening, reinvestigation, and a new determination of the issue?

CERTIFICATE OF COUNSEL REQUIRED BY RULE 21(b) OF THE GENERAL RULES OF THE UNITED STATES SUPREME COURT

The undersigned counsel of record for the petitioner certifies that the following listed parties appeared upon the pleadings below:

I. As plaintiff (petitioner) herein:

Grant Anthony

II. As defendants (respondents) herein.

Otis R. Bowen, */ Secretary of the United States Department of Health and Human Services; and

The United States of America.

/s/
Glenn H. Carlson, Esquire
Attorney of Record for Petitioner

*/ Pursuant to Federal Rule of Civil Procedure 25(d)(1), Mr. Bowen was substituted for Margaret M. Heckler by the District Court. See 674 F. Supp. 876.

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No. 88-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GRANT ANTHONY,

Petitioner,

v.

OTIS R. BOWEN, Secretary
United States Department of
Health and Human Services, et al.,

Respondents.

INTRODUCTION

Grant Anthony hereby petitions this Court for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, entered on June 7, 1988, is reported at 848 F.2d 1278 (D.C. Cir. 1988) and appears in the Appendix ("A") at 5a. Mr. Anthony's petition for rehearing and motion for clarification were denied by order dated August 17, 1988, as was also his suggestion for rehearing en banc; these, too, appear in the Appendix, at 3a and 1a, repectively. The opinion and order of the District Court, dated July 29, 1987, were unreported; these are printed in the Appendix hereto at 24a.

JURISDICTION

Jurisdiction over this petition obtains under Rule 20.2 of the Rules of this Court. Jurisdiction of the District Court was claimed under both Title VII of the Civil Rights Act of 1964 (42 U.S.C., sections 2000-e, et seq.) and The

Mandamus Act (28 U.S.C., section 1361), although only the latter was found by both the District Court and the Court of Appeals to be the proper jurisdictional vessel in the circumstances.

STATUTES AND REGULATIONS INVOLVED

Petitioner's substantive claims arose under Title VII of the Civil Rights Act of 1964 (42 U.S.C., sections 2000e, et seq.). In the District Court and in the Court of Appeals he successfully obtained enforcement of Title VII under The Mandamus Act (28 U.S.C., section 1361), but was told by the Court of Appeals that he could only, if at all, obtain his attorney's fees in accord with the provisions of the Equal Access to Justice Act (28 U.S.C., section 2412). The relevant text of these attorneys' fees provisions is set forth in the Appendix at 32a and 33a.

STATEMENT OF THE CASE

The history of this case is detailed in the opinion of the Court of Appeals, A at 6a - 13a. Suffice it to say that the agency, the Department of Health and Human Services, wrongfully denied to petitioner his right to have certain claims of illegal discrimination duly investigated ("The STRIDE claims"), while simultaneously it attempted to reopen for investigation a claim of illegal discrimination upon which the Equal Employment Opportunity Commission ("EEOC") had found "reasonable cause" to believe that discrimination had occurred ("the special leave procedure issue"). On this latter claim, the agency had instituted remedial action to cure the violation, and had done so long before its attempt to reopen the matter. The agency also expressly adopted in toto the recommended disposition of the case

issued by the EEOC, even though earlier, by operation of law, that recommendation had become the agency's own after the lapse of a thirty day period.

In the District Court, the agency was told it could not reopen the special leave procedure issue. Anthony v. Bowen 674 F. Supp. 876, 880 (D.D.C. 1986). In an unpublished opinion, the Court of Appeals directed the agency to investigate all of the STRIDE allegations. Anthony v. Bowen, No. 86-5473 (D.C. Cir., March 5, 1987) (per curiam) [812 F.2d 13 (table)].

Petitioner asked the District Court for an award of attorneys' fees and costs totalling $40,645.75. On July 29, 1987, the District Court, under Title VII, awarded him his request. The Court of Appeals reversed the attorneys' fees award, saying:

> Having chosen to invoke the Federal Court's mandamus jurisdiction, Anthony cannot at

> this time present himself as having prevailed on the merits of his Title VII claim. As is made clear by Hanrahan [v. Hampton 446 U.S. 754 (1980)] and Grubbs [v. Butz, 548 F.2d 973 (D.C. Cir. 1976)], the claimant's proof of a civil rights violation is a prerequisite to an attorney's fee award under 42 U.S.C., section 2000e-5(k).

A at 19a.

REASONS FOR GRANTING THE WRIT

I. A final determination on the merits of a substantive civil rights violation derived indirectly from exercise of Mandamus Act jurisdiction demands Title VII prevailing party status for the purpose of awarding attorneys' fees.

This case presents to this Court for the first time the problem of the relationship between rights embodied in Title VII and their enforcement through the Mandamus Act, in the context of a determination of prevailing party status

for purposes of an attorneys' fee award. The first aspect in need of determination is whether exercise of Mandamus Act jurisdiction, to the exclusion of Title VII jurisdiction, precludes an award of attorney's fees. The Court of Appeals held it did. A at 19a. Yet, this is a simplistic approach, one not demanded by Title VII itself, or by Hanrahan or Grubbs upon both of which the Court of Appeals relied. Petitioner argues that where an order issues under the Mandamus Act, which order has the effect of finally determining a civil rights violation under Title VII, then a finding of Title VII prevailing party status is required, irrespective of the jurisdictional vessel.

II. Mandamus jurisdiction is always derivative from a pre-existing non-discretionary obligation.

Actions where jurisdiction is predicated upon The Mandamus Act are derivative; jurisdiction is determined by a pre-existing mandatory duty owed to the plaintiff by the defendant, which duty the defendant failed to perform. American Association of Retired Persons v. Equal Employment Opportunity Commission, 655 F. Supp. 228 (D.D.C. 1987), rev'd on other grounds, 823 F.2d 600 (D.C. Cir. 1987); Covelo Indian Community v. Watt, 551 F. Supp. 366 (D.D.C. 1982); National Association of Rehabilitation Facilities, Inc. v. Schweiker, 550 F. Supp. 357 (D.D.C. 1982); and see Jones v. Alexander, 609 F.2d 778 (5th Cir. 1980) cert. denied 449 U.S. 832 (1980); Carpet, Linoleum & Resilient Tile, Etc. v. Brown, 656 F.2d 564 (10th Cir. 1981). In the case at bar, the underlying, mandatory duties were in the first instance established by

Title VII and its implementing regulations. Were it not for the filing of Mr. Anthony's Title VII formal complaint at the administrative level, under 29 C.F.R., Part 1613, and the agency's failure to perform its nondiscretionary duties under those laws, the jurisdiction of the District Court could not have attached through The Mandamus Act.

In Covelo Indian Community v. Watt, supra., the plaintiffs asserted that the Secretary of the Interior and other government defendants violated, inter alia, a Congressional mandate contained in section 2 of P.L. 96-217. The plaintiffs therein relied on 28 U.S.C., sections 1331 (federal question), 1361 (mandamus) and 1362 (Indian Tribes) as grounds for establishing subject matter jurisdiction in the District Court. The cause of the action, however,

was predicated under the statutory mandate contained within section 2 of P.L. 96-217.[1/] The Court, clearly distinguishing the function of the substantive statute from that of the jurisdictional enabling statute, stated that:

> To determine whether plaintiffs have stated a claim that arises under Section 2 of P.L. 96-217 and thereby confers jurisdiction through sections 1331 and 1362 as well as a claim that properly seeks injunctive relief in the nature of mandamus, whose jurisdictional root is section 1361, we must look to the complaint and the language of P.L. 96-217.

551 F. Supp at 379; emphasis supplied.

In other words, no mandamus jurisdiction

1/ The plaintiffs there also asserted the Administrative Procedure Act (APA) for the standard fo review to be applied, as P.L. 96-217 did not provide a standard. The plaintiffs had also plead the due process clause of the 5th Amendment; however, after finding jurisdiction under the statutory claims, the court found it unnecessary to address the Constitutional ground.

could obtain without the pre-existance of a substantive right. In the District Court, Mr. Anthony, as did the plaintiffs in Covelo Indian Community v. Watt, properly relied upon a substantive statute (Title VII) and its implementing regulations as the basis of his cause of action.

III. Petitioner prevailed on the merits of a substantive Title VII issue.

A. Preclusion of the reopening of an administrative determination of a Title VII violation, where the agency had expressly adopted the EEOC finding and where the agency had instituted the remedial action constitutes a substantive victory upon the merits within Hanrahan.

Mr. Anthony did prevail on his Title VII claims; he did establish entitlement to and did receive Title VII

relief; he established a Title VII violation. The District Court in discussing the special leave restriction issue found:

> Defendant [H.H.S] justifies [its having reopened the special leave issue for further investigation after adopting a finding of discrimination an awarding relief] on two grounds: (1) the termination of plaintiff's leave restrictions was unrelated to the investigation of his discrimination complaint and therefore was not part of a final disposition of his complaint, and (2 the disposition of this claim is not final since both parties can seek de novo review of the decision in federal court. Both justifications are without merit. Defendant's argument that it never executed the EEOC's proposed remedial order, but rather removed plaintiff from restricted leave status because of his improved behavior, is entirely beside the point. Both by operation of the governing regulations and its own formal adoption of the recommended disposition, the agency issued as its own remedial order the termination of plaintiff's leave status and the requirement that such procedures be applied in a non-discriminatory manner in the future. The fact that the

> agency may have earlier removed plaintiff from restricted status for other reasons in no way changes its formal disposition of his charge; Defendant's argument that the availability of de novo review renders its disposition non-final is also misplaced. Defendant relies on Moore v. Devine, 767 F.2d 1541 (11th Cir. 1985), in which the Eleventh Circuit ruled that, just as federal employees are entitled to de novo review of adverse EEOC findings, so too federal agencies may challenge in federal court EEOC rulings adverse to them. Moore, however, is simply inapposite to the present case. The agency here did not challenge the EEOC's findings, but adopted those findings as its own. Whatever right it had to de novo review of the EEOC's findings on the special leave issue was forfeited by its adoption of those findings. The mere fact that the agency had a right to such review initially cannot justify an agency's decision to reopen issues. Such a rule would render all agency dispositions of discrimination claims non-final and subject to change. Accordingly, the Court grants plaintiff's motion for summary judgment with respect to the special leave claim.

674 F. Supp. at 880; emphasis in original.

The special leave issue had been raised by Mr. Anthony in his formal EEOC Complaint:

> 3. Counseling for white employees, on the unit in which I work, is conducted in a manner to benefit those employees for communicating to them the proper manner in which to act so as to secure to them the most benefits. Black employees are counseled after the fact. For example, two White nurses were counseled on special leave, so as to avoid the procedure, while Black employees were told almost nothing until they ended upon special leave procedures. The Blacks were surprised by these procedures.
>
> 4. Special leave procedures are used against Black employees, but are rarely used against Whites.

Joint Appendix in 86-5473, p. 57.

In attempting to re-open for further investigation this aspect of the case, the agency was attempting to weasel out of the EEOC finding of discrimination, and the finding of a Title VII violation that the agency itself had

made when it adopted the EEOC findings. When the District Court in essence, said, "no, you cannot re-open that decision," after the agency had already done so (see Joint Appendix in 86-5473, p. 121, paragraphs numbered 2 and 3), Mr. Anthony was in the position of having secured or reestablished the violation of Title VII to which the agency had admitted and, as well, his entitlement to the relief stated in the agency decision. Indeed, this is a substantive Title VII relief upon the merits of his claim.

B. Court of Appeals misread Hanrahan when it concluded that the Hanrahan plaintiffs surely furthered the substantive goals of the civil rights laws..." and still did not receive attorneys' fees.

This is not the same case as with the claimants in Hanrahan v. Hampton, 446

U.S. 754, reh'g denied, 448 U.S. 913 (1980). The facts of Hanrahan were completely different from those presented here. Petitioner respectfully disagrees with the conclusion that "[t]he plaintiffs in Hanrahan surely furthered the substantive goals of the civil rights laws by obtaining a reversal on appeal of the directed verdicts that had been erroneously rendered against them." A at 20a - 21a. The point this Court was making in Hanrahan was that the substantive goals had not been furthered by the reversal of the directed verdicts. The express position of this Court was that the Hanrahan plaintiffs were left in no better position than had they "simply defeated the defendant's motion for directed verdict in the trial court." 446 U.S. at 758-759. After the District Court's decision of April 24, 1986, the petitioner here was left in a

substantively better position: The leave issue was over, and it was over in a fashion whereby he won his claim on the merits, forever, that a Title VII violation had occurred. This is not Hanrahan; the plaintiffs there made no showing of any determination of any "substantive right."

In adopting its jurisdictional vessel focus (A at 19a), the Court of Appeals blinded itself from the substantive civil rights violation of the agency which the District Court order had finally determined. 674 F. Supp. at 880. The petitioner is not only a "prevailing party" under EAJA (A at 22a), as the Court of Appeals held him to be exclusively, but he is also a "prevailing party" under Title VII.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5342 September 1987

CA 84-00385

Filed August 17, 1988

GRANT ANTHONY

APPELLEE,

v.

OTIS R. BOWEN, Secretary
United States Department of
Health & Human Services, et al.,

APPELLANTS.

BEFORE: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG AND SENTELLE, Circuit Judges, and PALMIERI, */ Senior District Judge, United States District Court for the Southern District of New York.

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*/ Sitting by designation pursuant to 28 U.S.C., section 294(d).

ORDER

Appellee's suggestion for rehearing en banc has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

FOR THE COURT:

Constance L. Dupre
Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5342

September Term, 1987

CA 80-00385

Filed August 17, 1988

GRANT ANTHONY,
APPELLEE,

v.

OTIS R. BOWEN, Secretary
United States Department of
Health & Human Services,
et al.,
APPELLANTS.

BEFORE: BUCKLEY and WILLIAMS, Circuit Judges, and PALMIERI, */ Senior District Judge, United States District Court for the Southern District of New York.

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*/ Sitting by designation pursuant to 28 U.S.C. section 294(d).

ORDER

Upon consideration of Appellee's Petition for Rehearing and Motion for Clarification, it is

ORDERED, by the Court, that the aforesaid Petition and Motion are denied.

Per Curiam

FOR THE COURT:
Constance L. Dupre
Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 25, 1988 Decided June 7, 1988

No. 87-5342

GRANT ANTHONY,
APPELLEE,

v.

OTIS R. BOWEN, Secretary
United States Department of
Health & Human Services, et al.,
APPELLANTS.

Patricia D. Carter, Assistant United States Attorney, with whom Jay B. Stephens, United States Attorney, Joseph E. diGenova, United States Attorney, at the time appellants' brief was filed, John D. Bates, R. Craig Lawrence, and Michael J. Ryan, Assistant United States Attorneys, Washington, D.C. were on the briefs, for appellants.

Glenn H. Carlson, Washington, D.C., for Appellee.

Before BUCKLEY and SENTELLE, Circuit Judges, and PALMIERI, */ United States Senior District Judge for the Southern District of New York.

Opinion for the court filed by Senior District Judge PALMIERI.

PALMIERI, Senior District Judge:

Otis R. Bowen, the Secretary of the United States Department of Health and Human Services, appeals from an award of attorney's fees made by the United States District Court for the District of Columbia in favor of the Appellee, Grant Anthony, in the sum of $40,645.75. The award resulted from an action brought by Anthony under the Mandamus Act, 28 U.S.C., section 1361 (1982).

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*/ Sitting by designation pursuant to 28 U.S.C., section 294(d).

I

On May 10, 1979, Anthony filed a formal administrative complaint with the Equal Employment Opportunity Commission (the "EEOC") alleging race and sex based discrimination by his employer, the United States Department of Health and Human Services (the "agency"). 29 C.F.R. section 1613.214 (1978). In his complaint, Anthony asserted, inter alia, that the Agency had applied special leave procedures to him in a discriminatory manner, and that the agency had discriminated against him by not selecting him for eighteen "STRIDE" (training program) positions. 1/

On August 12, 1981, after investigating Anthony's complaints, the EEOC

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*/ Anthony had previously made an informal complaint and sought counseling with an Equal Employment Opportunity counselor, as required by 29 C.F.R., section 1613.214(a)(1)(i) (1978).

propounded a Recommended Disposition of Anthony's complaint. In its Recommended Disposition, the EEOC concluded that there was reasonable cause to believe that the agency had discriminated against Anthony in applying the special leave procedures to him. It concluded that there was no reasonable cause to believe the agency had discriminated against Anthony by denying him admission to the STRIDE program. It discussed only the five positions for which Anthony had been rated highly qualified, and did not mention the other thirteen positions in the STRIDE program, all of which he had applied for.

The EEOC's Recommended Disposition was automatically adopted by the agency following the lapse of thirty days, by operation of 29 C.F.R., section 1613.216(c)(1981). In addition, the agency explicitly adopted the Recommended

Disposition as its own nearly eight months later, on April 5, 1982.

On April 21, 1982, Anthony requested a hearing with respect to the agency's denial of his claim on the STRIDE program issue. 29 C.F.R., section 1513.218(b)(1981). On December 16, 1982, the EEOC hearing examiner returned the complaint file to the agency without having conducted a hearing, based on the following: (1) "insufficient investigation;" and (2) "no letter of acceptance of Mr. Anthony's Formal Complaint of Discrimination." These reasons were stated in a form letter, with no accompanying opinion or explanation.

On March 9, 1983, the agency transmitted a letter to Anthony, informing him that it "accepted the formal complaint of discrimination" and that it would fully investigate a number of the allegations in the formal

complaint, including the special leave issue and the STRIDE issue with regard to the five position for which Anthony had been rated highly qualified.

Disagreeing with the agency's interpretation of the EEOC's mandate, Anthony, on April 20, 1983, attempted to appeal to the EEOC the agency's decision to reopen its investigation of the special leave issue and its decision not to investigate his complaint of race discrimination with regard to the thirteen STRIDE positions not mentioned in the EEOC's Recommended Disposition.

Only a final agency decision on a formal discrimination complaint may be appealed to the EEOC. 29 C.F.R., section 1613.233(a) (1983). The EEOC therefore denied Anthony's appeal, holding that his "appeal is prematurely file and is rejected. The Commission notes that the appellant may file an appeal, if he so

desires, after he has received a final agency decision on a formal discrimination complaint pursuant to 29 C.F.R., section 1613.233(a) [(1983)]." Anthony v. Department of Health and Human Services, at 1, EEOC Appeal No. 01831594 (December 28, 1983).

Anthony filed suit in the District Court for the District of Columbia on February 6, 1984, asserting jurisdiction under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C., sections 2000e, et seq. (1982), and seeking relief under the Mandamus Act, 28 U.S.C., section 1361 (1982), and the Declaratory Judgment Act, 28 U.S.C., sections 2201-2202 (1982). He challenged the agency's decision as to the scope of the investigation it would conduct on the two issues, but did not and could not seek to litigate the underlying merits of his Title VII complaint which, at the time

the District Court rendered its decision on the merits, was still pending. Anthony v. Bowen, 674 F. Supp 876, 877 (D.D.C. 1986).[2/]

The District Court in that decision held that the agency could not reopen its investigation with regard to the special leave issue. Its decision that the agency need not investigate his non-placement in the remaining STRIDE positions was reversed by this Court in Anthony v. Bowen, No. 86-5473, unpublished opinion at 1-3 (D.C. Cir. March 5, 1987) (per curiam) [812 F.2d 13 (Table)].

In the meantime, and after the District Court had issued its opinion, Anthony moved for an award of an attorney's fee at the rate of $150.00 per hour, pursuant to the attorney's fee

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2/ There is no indication in the record as to the current status of the agency's investigation in Anthony's claims.

provision of Title VII, 42 U.S.C., section 2000e-5(k) (1982), or, in the alternative, pursuant to the Equal Access to Justice Act, 28 U.S.C., section 2412 (1982 & Supp. III 1985). Anthony amended his attorney's fee application to include the work his attorney did on the appeal after the appellate decision of March 5, 1987.

The District Court granted Anthony's attorney's fee request in its entirety implicitly relying on the Title VII provision, Anthony v. Bowen, Civil Action No. 84-0385, slip op. (D.D.C. July 29, 1987), and this appeal followed.

II

This case serves to underscore the differences between two statutes designed to ease the burden of litigation against the government in certain situations: the attorney's fee provision of Title VII, 42

U.S.C., section 2000e-5(k) (1982),[3] and the Equal Access to Justice Act of 1980, 28 U.S.C., section 2412 (1982 & Supp. III 1985).[4] Both statutes do so by awarding

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3/ That provision reads:
Section 2000e-5(k). Attorney's fee; liability of Commission and United States for costs.

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

4/ Equal Access to Justice Act reads, in part:
Section 2412. Costs and fees.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... incurred in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

attorney's fees to a party who prevails in a litigation against the United States Government. But the manner in which a party must "prevail" and the method of calculating his renumeration are different under each statute.

In order to come within the Title VII provision's "prevailing party" requirement, a party seeking an attorney's fee must have "prevailed on the merits" of a discrimination claim by demonstrating actual discrimination in violation of Title VII, See Grubbs v. Butz, 548 F.2d 973, 975-76 (D.C. Cir. 1976), cited with approval in Hanrahan v. Hampton, 446 U.S. 754, 759 n.4, (construing the Civil Rights Attorney's Fee Act of 1976 to the same effect),

reh'g denied, 448 U.S. 913 (1980). In contrast, a "prevailing party" for[5/] purposes of the Equal Access to Justice Act, need only have succeeded "on any significant issue in litigation which achieves some of the benefit sought in bringing suit." Hirschey v. Federal Energy Regulatory Commission, 760 F.2d 305, 309 n.20 (D.C. Cir.) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), app. after remand, 777 F.2d 1 (D.C. Cir. 1985).

The two statutes also differ significantly in the method of determining the amount of compensation available to parties who properly invoke them. The

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5/ The 1976 Civil Rights Attorney's Fee Act was patterned on the attorney's fee provisions of the Civil Rights Act of 1964, including that contained in Title VII. Hanrahan v. Hampton, supra, 446 U.S. at 758 n.4, (citing S. Rep. No. 94-1011, p. 2 (1976); H.R. Rep. No. 94-1558, p.5

Title VII provision does not set a limit on the rate of compensation for an attorney whose fee is paid under its auspices. Awards at the rate of $150.00 per hour, as was the case here, are not unheard of. See Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 55, 59 (D.C. Cir. 1987) (Wald, C. J., concurring in part, dissenting in part), reh'g en banc granted, 830 F.2d 1182 (D.C. Cir. 1987).

The maximum rate of remuneration for an attorney's fee award under the Equal Access to Justice Act was set in October 1981 at $75.00 per hour. 28 U.S.C., section 2412(d)(2)(A)(ii) (1982 & Supp. III 1985). That rate is adjusted yearly for inflation. Ibid.; see Massachusetts Fair Share v. Law Enforcement Assistance Administration, 776 F.2d 1066, 1069 (D.C. Cir. 1985); Action on Smoking and Health v. C.A.B.,

724 F.2d 211, 218 (D.C. Cir. 1983).

In granting Anthony's fee request in its entirety, the District Court implicitly relied upon the attorney's fee provision of Title VII: it based the award on a rate of $150.00 per hour and discussed the Supreme Court's opinion in Hanrahan. Because we find that Anthony has not prevailed on the merits within the purview of the applicable statutory provision, 42 U.S.C., section 2000e-5(k) (1982), we must vacate the District Court's judgment.

The record contains no mention of the final disposition of Anthony's actual Title VII claims. We can only assume that investigation and resolution of those claims are not yet final. It was for that reason that the EEOC held that Anthony's appeal was premature under 29 C.F.R., section 1613.233(a), and that both the District Court and this Court

held that Anthony's claims did not arise under Title VII. Instead, we held that Anthony was entitled to relief pursuant to the Mandamus Act, 28 U.S.C., section 1361 (1982). The District Court's final order directed the agency to pursue its investigation of Anthony's civil rights claims regarding certain issues and not to investigate others.

Having chosen to invoke the Federal Court's mandamus jurisdiction, Anthony cannot at this time present himself as having prevailed on the merits of his Title VII claim. As is made clear by Hanrahan and Grubbs, the claimant's proof of a civil rights violation is a prerequisite to an attorney's fee award under 42 U.S.C., section 2000e-5(k).

Anthony's argument that he won everything he sought in this litigation confuses the "prevailing party" requirement of the Title VII provision

with that of the Equal Access to Justice Act. The kind of victory Anthony won comports with an award under the Equal Access to Justice Act. Hirschey v. Federal Energy Regulatory Commission, supra, 760 F.2d at 309 n.20. No matter how successful he was in litigating the issues he came to court to redress, he cannot come with the Title VII violation. Hanrahan, supra, Grubbs, supra.

Anthony attempts to avoid this requirement by arguing that the Mandamus Act is merely a jurisdictional vessel, and that since he furthered the substantive goals of Title VII, he should be entitled to an award under the Title VII provision. The clear import of Hanrahan and Grubbs leave no room for that argument. The plaintiffs in Hanrahan surely furthered the substantive goals of the civl rights laws by obtaining a reversal on appeal of the

directed verdicts that had been erroneously rendered against them. See Hanrahan, supra, 446 U.S. at 755. Despite that fact, the Court said that "it seems clearly to have been the intent of Congress to permit [the award of fees pendente lite] only to a party who has established his entitlement to some relief on the merits of his [civil rights] claims, either in the trial court or on appeal." Id. at 757. Just as plaintiffs in Hanrahan had not yet established the validity of their civil rights claims, Anthony has not yet established the validity of his. He has won the right to have his STRIDE claims investigated. He has won the right to preclude further investigation of his special leave procedures claim. Those victories, without more, cannot establish his success on the merits of either claim. No final disposition at any

administrative level of any of his Title VII claims appears in the record. At a minimum, the remaining administrative investigation and hearing must take place first. Anthony is not, therefore, entitled to an award under the Title VII provision.

However, for purposes of the Equal Access to Justice Act, Anthony is a prevailing party in this litigation. Hirschey v. Federal Energy Regulatory Commission, supra, 760 F.2d at 309 n.20. He came to court seeking interlocutory supervision of the administrative processing of his discrimination claims. He sought to prevent further investigation of one claim, and won. He sought to force investigation of other claims, and won.

Basing its award upon the Title VII provision, the District Court did not reach the issue whether the government's

position was "substantially justified" as is required under the Equal Access to Justice Act. See, e.g., Federal Election Commission v. Rose, 806 F.2d 1081, 1086-92 (D.C. Cir. 1986).

We therefore vacate the judgment of the District Court and remand for determination of Anthony's entitlement to an attorney's fee award under the Equal Access to Justice Act, and for entry of an appropriate order.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. 84-0385

Filed July 29, 1987

GRANT ANTHONY
PLAINTIFF,

v.

OTIS R. BOWEN
DEFENDANT.

OPINION AND ORDER

Before the Court is plaintiff's supplemental request for attorney's fees and defendant's opposition thereto. The Court finds plaintiff is entitled to the relief he seeks and will therefore enter an appropriate order and accompanying judgment.

In his supplemental request, plaintiff seeks $40,645.75 in attorney's fees for work performed in the prosecution of

this suit both before this Court and the Court of Appeals. Defendant does not challenge the reasonableness of the time spent on this work or the hourly rates charged for it. Rather, the government contends that plaintiff has, to date, won nothing more than a procedural victory for which, under controlling case law in this circuit, he is not entitled to compensation. The Court cannot agreee.

Both here and in the appellate court, plaintiff sought "an order directing defendant to investigate certain of his claims of discrimination . . . and an order barring defendant from 'reopening' an investigation into another claim of discrimination [the "leave" issue] that [he contends] has been resolved in his favor." Anthony v. Bowen, No. 84-0385, slip op. at 1 (D.D.C. Apr. 25, 1986). This Court found in favor of plaintiff on his leave claim but declined

to order defendant to broaden the scope of its investigation. The Court of Appeals affirmed the Court's disposition of the leave issue but reversed on the scope of the investigation claim. Anthony v. Bowen, No. 86-5473 (D.C. Cir. Mar. 5, 1987). Upon remand this Court dismissed the case with an order directing defendant to broaden the investigation to include the additional charges of discrimination plaintiff seeks to raise. His civil rights claim for full administrative investigation was therefore ultimately determined to be non-frivolous and clearly more than colorable. Plaintiff has obtained the full relief he sought in these judicial proceedings.

Defendant characterizes plaintiff's success as an "interlocutory disposition," Defendant's Opposition at 1, and argues that plaintiff has not yet

"demonstrated even the slightest probability of success on the merits." Id. at 2. Plaintiff, however, has clearly won more than a mere procedural victory - he prevailed on the merits of his claims that defendant could not reopen the leave issue previously decided in his favor, and that defendant was required to investigate the additional charges he wished to prosecute administratively. As this circuit has explained:

> In "procedural victory" cases such as Hanrahan [v. Hampton, 446 U.S. 754 (1980)] the party is held not to have prevailed because his litigation goals are clearly not satisfied by the procedural victory. For example, when an appellate court rules that a trial on an issue must be held, the plaintiffs have not prevailed; "[a]s a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendant's motion for a directed verdict in the trial court." Hanrahan, 446 U.S. at

> 758-59 ... In such cases the procedural victory relates only to the litigation process, and the plaintiffs have not prevailed on what they originally came into court for. Here, by contrast, the victory represented a substantial part of what plaintiffs asked the court for in the first place.

Grano v.Barry, 783 F.2d 1104, 1109-10 (D.C. Cir. 1986) (emphasis in original). In the present case, while plaintiff did not prevail on each and everyone of his legal theories, he received essentially everything he sought by way of relief. Accordingly, he is entitled to recover attorney's fees. See also Massachusetts Fair Share v. Law Enforcement Assistance Administration, 776 F.2d 1066, 1068-69 (D.C. Cir. 1985) (plaintiffs who obtained court order that two agencies -- instead of one -- had to make decision on grant were prevailing party since "this is precisely the point that [plaintiffs] litigated, and won"); Bagby v.Beal, 606

F.2d 411, 415 (3d Cir. 1979) (plaintiff who obtained court order granting her a due process right to administrative hearing was prevailing party even though the hearing eventually affirmed her dismissal). There are no special circumstances here that would render such an award unjust.

For all the foregoing reasons, it is hereby

ORDERED that plaintiff, Grant Anthony, be an hereby is entitled to attorney's fees and expenses, as requested, and as reflected on the accompanying judgment.

IT IS SO ORDERED.

/s/
JOYCE HENS GREEN
United States District Judge

July 29, 1987

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. 84-0385

Filed July 29, 1987

GRANT ANTHONY,
PLAINTIFF,

v.

OTIS R. BOWEN,
DEFENDANT.

JUDGMENT

In consideration of the Opinion and Order entered this date awarding plaintiff his attorney's fees and expenses, judgment is hereby entered in favor of the plaintiff, Grant Anthony, and against defendant, Otis R. Bowen, Secretary, Unites States Department of Health and Human Services, in the amount of forty thousand six hundred forty-five dollars and seventy-five cents ($40,645.75).

/s/
JOYCE HENS GREEN

United States District Judge

July 29, 1987

APPENDIX E

Civil Rights Act of 1964, 42 U.S.C.

Section 2000e-5(k). Attorney's fee; liability of Commission and United States for costs.

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Equal Access To Justice Act, 28 U.S.C. Section 2412. Costs and fees.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other eXpenses... incurred in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.